In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1611

W. R. BEAN & SON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 450 F. 2d 93. The Board's decision and order (Pet. App. C) are reported at 185 NLRB No. 81.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on November 18, 1971, and a petition for rehearing was denied on January 12, 1972 (Pet. 2). On March 16, 1972, Mr. Justice Powell extended the time to file a petition for a writ of certiorari to May 11, 1972, and, on April 24, he further extended

such time to June 10, 1972. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging employee Holmes because of her union activity.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3–4. Section 7 is also relevant, and provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

STATEMENT

1. Rosa R. Holmes was a part-time employee in the Company's printing bindery, employed primarily on Sundays and Mondays from 4 p.m. to midnight. Holmes first worked for the Company in July 1965, but was discharged the same month as a result of her activity in

the unsuccessful organizing campaign of the Union.[1] By order of the Board (158 NLRB 712), she was reinstated in May 1966[2] (Pet. App. 42; A. 23, 32–33, 48, 54).

In February 1969, the Board certified the Union as the bargaining representative of the Company's bindery workers, after a campaign in which Holmes distributed authorization cards for the Union and spoke in support of the Union among her co-employees. Holmes was then elected one of 3 employee members of the Union bargaining committee (Pet. App. 45–46; A. 21–22, 25–27, 29–30, 45–47, 77, 118–119, 131, 204–205). On March 13 Holmes' mother died unexpectedly; Holmes was notified at the plant by her foreman, Baker, and granted leave of no stated duration. About 2 weeks later Holmes telephoned Baker, informing him that she was close to returning but was unsure if she was ready; Baker excused her, stating that Holmes should simply let him know when she was ready to resume work. Holmes returned about a week later (Pet. App. 42–43; A. 31–32, 33–34, 51–53).

On April 11, a few days after her return, Holmes, as a member of the Union committee, attended the

[1] Atlanta Bookbinders' and Binderywomen's Union, Local 96.

[2] In 1967 and 1968 Holmes had a record, in the Examiner's words, of "excessive absenteeism" (Pet. App. 47), for which she was warned (Pet. App. 44; A. 100–101, 102, 164, 262–263). The court of appeals also noted that "during the latter part of 1968 Vice President Campbell had reviewed Holmes' record and had decided at that time not to discharge her" (Pet. App. 34–35; A. 249–250).

"A." refers to the appendix to the briefs in the court below.

first union-management bargaining session. On April 20 Holmes was again in the plant when notified that her son had just been killed in an accident. She was given leave and placed on sedation. Holmes telephoned Baker about two weeks later; she stated that she was still on sedation and was nervous and upset, but realized that she should be at work. Baker expressed understanding, pointing out that his own family had suffered similar tragedies; he added that Holmes need not hurry to return since work was not pressing[3] (Pet. App. 43; A. 34, 35–36).

The second bargaining session was scheduled for May 15. Holmes had not yet returned to work, and "did not want to go" to the session, since she "did not feel like going out in public" (A. 38). Union representative Crunkleton and employee Davis, however, urged Holmes to attend, since it "would do [her] good" (A. 38), and Holmes attended the meeting. At the next session, May 23, not attended by Holmes, Company counsel informed the Union representative, for the first time, that the Company was upset that Holmes had attended the prior session and were giving thought to discharging her. Holmes was not told of this conversation, nor did the Company request her to terminate her leave. During the next several days, the Company decided to discharge Holmes. When Holmes attended the fourth bargaining session on

[3] Shortly thereafter Holmes, through employee Davis, also asked Baker to change her work shift; Baker replied that he saw no obstacle and suggested that Holmes, when ready to return, discuss this change with the bindery superintendent (Pet. App. 43; A. 36–37, 133–134).

May 29, Vice President Campbell and Company counsel informed her of the decision; Holmes expressed surprise and pointed out that she had not been notified. Upon her return home that day, Holmes found the Company's discharge notice in the mail (Pet. App. 43-47, 49; A. 38, 39, 40, 69, 119–121, 126, 141–142, 143–144, 150, 309–310).

2. The Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging Holmes, not for excessive absenteeism, but for participating as a member of the union negotiating committee at the May 15 meeting (Pet. App. 48–49). The Board ordered the Company to reinstate Holmes with backpay (Pet. App. 40, 50–52).

The court of appeals sustained the Board's findings and enforced its order, holding that "there is substantial evidence on the record as a whole to support the conclusion of the Board that Holmes' discharge was discriminatory and interfered with the protected rights of employees under Section 8(a)(1) and (3) of the Act" (Pet. App. 35). The court of appeals also rejected the Company's objections to certain procedural rulings of the trial examiner.

ARGUMENT

The record in this case does not present the question stated in the petition (Pet. 2)—whether there can be a violation of Section 8(a)(3) of the Act "without a showing of both discrimination and motivation * * * aimed at achieving the prohibited effect." The examiner expressly found (Pet. App. 48) that Holmes was discharged not on the grounds of absenteeism, but be-

cause of her union activity. The Board adopted this finding (Pet. App. 39), and the court of appeals held that it was supported by substantial evidence (Pet. App. 35).[4]

The issue presented by the present record is whether substantial evidence supports the Board's finding that the Company discharged Holmes because of her participation in union activities. Such an issue, turning as it does on the particular facts presented, does not warrant further review. In any case, there is ample basis for the Board's conclusion. The court below carefully summarized this evidence, stating (Pet. App. 34–35):

> * * * there is * * * evidence in the record that Mrs. Holmes was an active union adherent and organizer who had been previously discharged for union activities and reinstated by the Board and who was now a member of the negotiating committee. The evidence indicates that during the latter part of 1968 Vice President Campbell

[4] Petitioner contends (Pet. 11) that the court of appeals failed to find that Holmes' discharge was discriminatory. The court specifically ruled, however, that "substantial evidence" supports the Board's conclusion "that Holmes' discharge was discriminatory" (Pet. App. 35), and accepted the Board's finding that Holmes was discharged because of her participation in the union negotiation session (*ibid.*). The Company is also mistaken in its contention that there is a conflict between the Fifth and First Circuits in the standard employed to determine sufficiency of anti-union motivation. In both circuits, as the cases quoted by petitioner reveal (Pet. 18–20), the test is whether the discharge would not have occurred but for the employee's protected activity. That test was satisfied here.

had reviewed Holmes' record and had decided at that time not to discharge her. There is evidence to support the conclusion that the decision to discharge Holmes was made by * * * Campbell the day after he was shocked to see her attend and participate in a union negotiating session on May 15, 1969, while she was on an extended absence, excused by her foreman as a result of two tragic deaths in her immediate family in little over a month's time. Further, the record discloses that the decision to discharge Holmes was made without notifying her that the Company expected her to return to work or without warning her that she would be discharged if she did not return. * * * [5]

[5] Petitioner's procedural contentions (Pet. 20) are similarly without merit. With respect to the examiner's power to permit prehearing discovery, petitioner is not prejudiced by any conflict between the Second and Fifth Circuits, since the court below agreed that the examiner possesses this power, but found that he did not abuse his discretion in declining to permit discovery here (Pet. App. 36). Moreover, the examiner's evidentiary rulings were proper. Thus, petitioner attempted to introduce evidence that Holmes was not an employee within the Act when she was first separated from the Company in July 1965 (A. 9, 116)—evidence immaterial to her discriminatory discharge in 1969. Similarly, petitioner's offer of proof that in the earlier hearing a union representative advised a witness to "stretch the truth" (A. 293) does not implicate Holmes and thus could not affect her right to reinstatement. Finally, petitioner attempted to show that Holmes had quit before her 1969 discharge by testimony that Holmes told another employee that she was "not in a position to work" (A. 292); the alleged conversation, however, took place on March 28 (A. 291)—after which Holmes did return to work until her son's death on April 20.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
NORTON J. COME,
Assistant General Counsel,
MICHAEL E. ABRAM,
Attorney,
National Labor Relations Board.

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